Supreme Court, U.S.
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No. 04-553

In The
Supreme Court of the United States
October Term, 2004

SYLVIA SIERRA,
Petitioner,
v.

STATE OF FLORIDA,
DEPARTMENT OF TRANSPORTATION,
Respondent.

On Petition For A Writ of Certiorari To The District Court of Appeal, Second District, State of Florida

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether due process of law was violated in an eminent domain case when the trial court refused to grant the landowner's request for a continuance in order to employ a replacement attorney to represent her in the trial.

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STATEMENT OF THE CASE

Respondent Department of Transportation (the "Department") commenced this action in April 2001 to acquire the subject property for use in an extensive project to improve the capacity of Interstate 4 in Tampa. At that time, Petitioner Sylvia Sierra was represented in this matter by Moran, Tileston & Simon, P.A., but that relationship ended in July 2001. (R. Vol. 1, p. 148). Sierra then retained her second attorney, Michael W. Gaines, in August 2001, (*id.*, p. 178); however, Gaines moved to withdraw from the representation three months later "based on some fundamental differences with the client[]," (R. Vol. 5, p. 981). Just prior to conducting its "order of taking" hearing concerning the subject property on November 8, 2001, the court permitted Gaines to withdraw after confirming with Sierra that she did not challenge the motion. (*Id.*, pp. 984, 1000).

The court then granted Sierra a continuance until November 16, 2001 to find replacement counsel, and advised Sierra that if she wished to get counsel for the order of taking hearing, she needed to "get on with that ASAP." (*Id.*, p. 1000). When Sierra did not get counsel for the hearing, the court required the hearing to go forward with Sierra proceeding pro se. (R. Vol. 12, p. 1185). The trial judge afforded Sierra a great deal of latitude, at one point explaining that he "need[ed] to bend over backwards" to accommodate her because of her lack of legal training. (*Id.*, p. 1263). In December 2001, Sierra retained her third attorney in this matter, William Haapa, Jr., who appeared on Sierra's behalf on December 20, 2001 and withdrew Sierra's objections to the order of taking. (R. Vol. 5, p. 927).

The case was eventually scheduled for trial the week of August 26, 2002. (R. Vol. 13, p. 1418). However, at a hearing on pre-trial motions on August 12, 2002, both counsel for the Department and for Sierra indicated that they might not be ready to proceed that week. The Department informed the court that one of its witnesses might have to undergo unexpected back

surgery, but that it would be ready for trial if he did not. (*Id.*, pp. 1390-93). Haapa asked for a two-month continuance on Sierra's behalf to acquire and prepare an expert on appraising properties in historic districts, representing to the court that an expert had just been located. (*Id.*, pp. 1393, 1395-96). The trial judge stated that he was not inclined to continue the trial, but advised the parties that if they stipulated to a continuance, he would "give some heavy weight" to their request. (*Id.*, pp. 1420-21).

At a hearing the following week, the Department indicated that it was ready to proceed to trial. (R. Vol. 12, pp. 1336, 1348). Haapa again sought a two-month continuance in order to prepare his historic valuation expert. (*Id.*, pp. 1351-52). The trial judge expressed reluctance but nonetheless granted the continuance, explaining that "[a]lthough . . . I really, really don't want to continue this, . . . I am nonetheless going to continue it. And the reason I'm going to continue it is so that there can be an adequate opportunity for Ms. Sierra to present . . . whatever evidence she plans to present, admissible or inadmissible." (*Id.*, pp. 1353-54). The trial date was moved forward to October 28.

Approximately two weeks later, on September 4, 2002, the parties were back in front of the trial court on Haapa's motion to withdraw–on the ground that he had irreconcilable differences with Sierra. (*Id.*, pp. 1366, 1369). Sierra indicated that she did not object to Haapa's withdrawal and that she no longer wanted him as her attorney. (*Id.*, p. 1367). The Department, however, strenuously objected to Haapa's withdrawal if it would cause the case to be continued past October 28, 2002, and asked the court to apprise Sierra that her discharge of Haapa is "done with full knowledge that anyone [she] hire[s] has to be hired under the condition that they're going to be ready to try this case October 28th." (*Id.*, pp. 1367-68). The Department also reminded the court of the history of the case, and of Sierra's track record in retaining counsel, noting that "Ms. Sierra will be going out looking to hire the fourth attorney," and that she will have difficulty "find[ing] an attorney

to represent her with the knowledge that she's already been through three attorneys." (*Id.*, p. 1368). The trial judge discharged Haapa, but made clear to Sierra that "[i]f you don't have a new counsel by October, I'll expect you to try the case on your own behalf," and warned her that "if you're going to find somebody, do it quick" because it would be problematic to have a new lawyer show up just before trial. (*Id.*, pp. 1369-371).

On October 24, 2002, seven weeks after Haapa withdrew, and four days before trial, Sierra appeared before the court to seek another continuance. The trial judge denied this request, explaining to her that although "[i]t would be my tremendously great preference to have you in here with an attorney[,] . . . I don't see one here and . . . I have no assurances that you're going to have one at any time." (R. Vol. 13, pp. 1469-471).

On October 28, 2002, Sierra appeared in court, and, during argument on a pre-trial motion, again raised the issue of a continuance to obtain a "historical lawyer." (Tr. Vol. I, pp. 19-20). The judge again explained why he denied her motion, stating: "The reason is I've granted you continuances already. I've heard argument from your attorney already. I advised you if you wanted to retain a new counsel, have him appear, ask for a continuance, but you've done none of those. . . . And so we're going to have the trial today." (*Id.*).

During the trial, the court afforded Sierra wide latitude in light of her self-representation, as it had during the order of taking hearing in November 2001. At one point, during a bench conference generated by a Department objection to Sierra's questioning, the judge informed the parties that he was "going to give [Sierra] a lot of latitude as long as the questions are in any way related to the value of the building and its value at the date of taking." (Tr. Vol. VI, pp. 586-87). Later in the trial, the court apprised Sierra, during a long colloquy, of the proper protocol for impeaching a witness's credibility after she had called a Department witness a liar. (*Id.*, pp. 707-08).

At trial, the Department presented evidence establishing that the value for the taking was $160,000. (Tr. Vol. IV, p. 363). The jury returned a verdict of $190,000. (Tr. Vol. IX, p. 1077).

Sierra appealed to the Florida Second District Court of Appeal (the "Second District"), raising essentially the same arguments that she now raises in her petition for certiorari–that the trial court's denial of her motion for a continuance to obtain replacement counsel violated due process, and that she was prejudiced as a result of having to proceed pro se. In April 2004, the Second District affirmed the trial court's judgment without opinion and, in May 2004, denied Sierra's motion for rehearing.

REASONS CERTIORARI SHOULD BE DENIED

I. The trial court did not abuse its discretion in denying Sierra's request for a continuance.

Whatever extent a right to counsel exists in eminent domain proceedings, Sierra has clearly confused the "right to be represented by counsel," which may be inherent in due process, "with the *necessity* of being represented by counsel, which is not." *Rex Investigative & Patrol Agency, Inc. v. Collura*, 329 F. Supp. 696, 699 (E.D.N.Y. 1971). While a trial judge cannot act so unreasonably as to undermine a litigant's access to effective representation, nothing in the Constitution entitles a litigant to delay a trial "by simply showing up without counsel . . . whenever his case is called for trial." *Sampley v. Attorney Gen. of North Carolina*, 786 F.2d 610, 613 (4th Cir. 1986), *cert. denied sub nom., Sampley v. Thornburg*, 478 U.S. 1008, 106 S. Ct. 3305, 92 L. Ed. 2d 719 (1986); *see also, e.g., Connor v. Scroggs*, 821 So. 2d 542, 553 (La. Ct. App. 2002) ("[T]he plaintiff is not entitled to indefinite continuances simply because he is unable to secure counsel."); *Maynard v. Bullis*, 222 P.2d 685, 686 (Cal. Ct. App. 1950) (holding that when plaintiff had more than two months notice of impending trial, "[t]he fact that eight attorneys had refused to represent him is not a ground for continuance of the trial"). Otherwise, "a party could prolong

litigation interminably merely by inducing counsel to withdraw or by discharging him." *Maneikis v. State*, 407 N.E.2d 1178, 1180 (Ind. Ct. App. 1980).

Even where constitutional rights are clearly implicated, the overwhelming weight of authority from this Court and others establishes that trial courts have broad discretion in matters of continuances that should not be disturbed absent "an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay.'" *Morris v. Slappy*, 461 U.S. 1, 11-12, 103 S. Ct. 1610, 1616, 75 L. Ed. 2d 610 (1983); *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S. Ct. 841, 849, 11 L. Ed. 2d 921 (1964) (noting that "[t]he matter of continuance is traditionally within the discretion of the trial judge"); *see also, e.g., Arabian Am. Oil Co. v. Scarfone*, 939 F.2d 1472, 1479 (11th Cir. 1991) (holding that trial court's discretion to deny continuance "will be disturbed only in extreme cases in which it clearly appears that the moving party was free of negligence") (quoting *Grunewald v. Missouri Pac. R.R.*, 331 F.2d 983, 986 (8th Cir.1964)). Courts have been particularly reluctant to reverse a trial court's decision to deny such a continuance when the litigant claiming error had either discharged her previous attorney just before trial or had acquiesced in her attorney's withdrawal. *See, e.g., National Am. Bank v. Bankers Int'l Ins. Co.*, 386 F.2d 216 (3d Cir. 1967) (holding that trial court had not abused its discretion in refusing to grant a continuance after appellant discharged his attorney); *see also* Carl T. Drechsler, Annotation, *Withdrawal or Discharge of Counsel in Civil Case as Ground for Continuance*, 48 A.L.R.2d 1155, 1159 (1956) ("There is not a single case involving the discharge of an attorney in which it was held that a continuance should have been granted [where] the taking by the party of an affirmative step caus[ed the] lack of representation at [] trial."). At least one state appellate court has applied this rule in affirming a trial court's denial of a property owner's request for a continuance in an eminent domain proceeding. *Maneikis*, 407 at 1180-81 (holding that trial court had not abused its

discretion by denying appellant's motion to continue jury trial on value of condemned property after appellant discharged her attorney just before trial).

This Court has also made clear that there is generally no right to counsel in civil proceedings where no significant interest in physical liberty is at stake. *Lassiter v. Department of Social Services*, 452 U.S. 18, 26-27, 101 S. Ct. 2153, 2159, 68 L. Ed. 2d 640 (1981) (recognizing presumption that a litigant has a right to counsel in civil proceedings "only when, if he loses, he may be deprived of his physical liberty"); *see also Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 332, 105 S. Ct. 3180, 3195, 87 L. Ed. 2d 220 (1985) (explaining in case where "the only interest protected by the Due Process Clause is a property interest in the continued receipt of benefits," precedent establishing parameters of due process protection in context of deprivation of liberty interests was "of only tangential relevance"); *Kentucky West Virginia Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 837 F.2d 600, 618 (3d Cir. 1988) ("The Supreme Court has not recognized a constitutional right to counsel in a civil case or in a civil matter before an administrative agency."). As this Court has never recognized a due process right to counsel in a civil trial where only a property interest is at stake,[1] a court could readily conclude that the issue of whether the trial court abused its discretion in denying Sierra's request for a further continuance to obtain new counsel exists independently of any federal right to due process protection.

In the criminal context, where the Sixth Amendment right to aid of counsel is implicated, this Court has stated that "it is not every denial of a request for more time that violates due process even if the party . . . is compelled to defend without counsel,"

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[1]Sierra, when represented by counsel, had previously withdrawn any objection to the taking itself. (R. Vol. 5, p. 927). The only remaining interest at issue was Sierra's right to monetary remuneration.

Ungar, 376 U.S. at 589, 84 S. Ct. at 849, and that "broad discretion must be granted trial courts on matters of continuances" because of the "great deal of latitude" that trial judges "necessarily require . . . in scheduling trials," *Morris*, 461 U.S. at 11, 103 S. Ct. at 1616. As such, this Court has concluded that denial of a continuance will be upheld unless it is "so arbitrary as to violate due process," *Ungar*, 376 U.S. at 590, 84 S. Ct. at 850, and that "only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel." *Morris*, 461 U.S. at 11-12, 103 S. Ct. at 1616. Intuitively, the right to aid of counsel can be no broader in the civil context, to the extent that it even exists. Accordingly, this Court's conclusion that constitutional rights are not implicated absent "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay" must apply *a fortiori* in this case, irrespective of whether, as a result of the trial court's decision, Sierra was compelled to represent herself at trial.

Weighed against this framework, the trial court's decision in this case could not possibly have violated Sierra's due process rights because it was eminently fair and reasonable under any standard of review. This case was scheduled to go to trial on August 26, 2002 when, on August 19, 2002, the trial court granted Sierra's request for a two-month continuance. (R. Vol. 12, pp. 1353-54). In doing so, the trial judge made abundantly clear to Sierra at that time that he "really, really [did not] want to continue this [case]," (*id.*), which should have put Sierra on notice that he would be disinclined to grant further continuances. Sierra voiced no objection two weeks later when Haapa, Sierra's third attorney in this matter, moved to withdraw, indicating, instead, that she no longer wanted Haapa as her attorney. (*Id.*, p. 1367). The trial judge then put Sierra on notice that she would not be getting any further continuances, stating unequivocally that "[i]f you don't have a new counsel by October, I'll expect you to try the case on your own behalf." (*Id.*, pp. 1369-370). As

such, Sierra could not possibly have been unfairly surprised by the trial court's decision. *See Taylor v. Gill St. Invs.*, 743 P.2d 345, 349 (Alaska 1987) (affirming trial court's denial of continuance after court granted previous continuances and informed appellant that no further continuances would be granted, and that appellant would have to represent himself if he did not appear with attorney).

Sierra's assertions of fundamental unfairness are further undermined by the fact that on September 4, 2002, at the time Sierra acquiesced in her counsel's withdrawal, her case had just been continued until October 28, 2002. Even if Sierra was entitled to a continuance to find replacement counsel, the court could have reasonably concluded that this eight-week period was long enough. *See, e.g.*, *Everitt v United States*, 303 F.2d 536, 543 (5th Cir. 1962) (concluding that defendant's "failure to find counsel during [ten-day continuance] suggests that if he tried at all he did not try very hard"), *cert. denied*, 372 U.S. 920, 83 S. Ct. 734, 9 L. Ed. 2d 725 (1963); *Roberson v. Roberson*, 309 S.E.2d 520, 522 (N.C. Ct. App. 1983) (characterizing three weeks as "ample opportunity to retain new counsel"). The trial judge implicitly made this point to Sierra in denying her request for the continuance on October 24, 2002, explaining that, as a result of her failure to obtain counsel and representations at the hearing, he "ha[d] no assurances that [she was] going to have [a replacement attorney] at any time." (R. Vol. 13, pp. 1469-471).

Indeed, Sierra's comment prior to trial on October 28, 2002, that she was seeking a continuance "so that [she] could get a historical lawyer," (Tr. Vol. I, p. 19), could have suggested to the court that she was waiting for a lawyer that specialized in historic preservation law, and that this was a substantial factor in the delay. Sierra admits as much in her petition in stating that she sought a continuance, not just to employ an attorney, but "to employ an attorney who understood both eminent domain law and 'historical law.'" Petition for Writ of Certiorari, at 4; *see also id.*, at 18 (commenting that requested hearing "probably

would have helped Ms. Sierra in locating an attorney who understood 'eminent domain and historical property law' . . . "). Surely, due process cannot require a court to wait indefinitely while a civil litigant seeks out such specialized representation.

To reverse the Second District's order in this case, this Court would have to overlook its precedent in the criminal context as well as the overwhelming weight of authority from state courts and lower federal courts. The test enunciated by this Court in criminal cases, which should apply with at least equal force here, is whether the trial court's decision constituted "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." *Morris*, 461 U.S. at 11, 103 S. Ct. at 1616 (internal quotations omitted). Where, as here, the trial court's decision was far from "unreasoning and arbitrary," there can be no due process violation.

II. There is no conflict with *Mathews v. Eldridge.*

The Second District's order affirming the trial court's entry of judgment is completely consistent with *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). As the discussion above demonstrates, this Court has not employed *Mathews* balancing in the context presented here–where a litigant claims that denial of a continuance violated her constitutional rights. In *Morris*, decided seven years after *Mathews*, this Court appeared to reaffirm the holding of *Ungar* that the only issue to be decided in this context is whether the trial court's decision was so "unreasoning and arbitrary" as to constitute abuse of discretion. *Morris*, 461 U.S. at 11-12, 103 S. Ct. at 1616; *see Ungar*, 376 U.S. at 590, 84 S. Ct. at 850 (stating test as whether trial court's decision was "so arbitrary as to violate due process").

Moreover, this Court explained in *Lassiter* that the factors enumerated in *Mathews*–the private interest at stake, the government interest, and the risk that the procedures employed may lead to erroneous decisions–must be weighed against the

presumption that there is no right to counsel "in the absence of at least a potential deprivation of physical liberty." *Lassiter*, 452 U.S. at 31, 101 S. Ct. at 2161-62. While Sierra acknowledges *Lassiter*, she fails to explain how her financial interest at stake in this case (getting full monetary compensation for her property)[2] is somehow more significant than the liberty interest at stake in *Lassiter* (termination of parental rights) in such a way that the presumption against additional process is overcome in this case while it was not overcome in *Lassiter*.

Sierra further errs in applying *Mathews* by undervaluing the governmental interest at stake, which she describes as "allowing a continuance so that [she] could get an attorney." Petition for Writ of Certiorari, at 18. While Sierra characterizes this interest, without analysis or citation of authority, as "low," *id.*, this Court and other courts have repeatedly recognized the importance of the trial judge's flexibility in scheduling trials to the effective administration of justice. *See, e.g., Morris*, 461 U.S. at 11, 103 S. Ct. at 1616; *Ungar*, 376 U.S. at 591, 84 S. Ct. at 850; *see also, e.g., United States v. Gallop*, 838 F.2d 105, 108 (4th Cir. 1988), *cert. denied*, 487 U.S. 1211, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988) (noting that right to choose counsel "must not obstruct orderly judicial procedure and deprive courts of the exercise of their inherent power to control the administration of justice"); *United States v. Khan*, 728 F.2d 676, 681 (5th Cir. 1984) (affirming denial of continuance on ground that any prejudice appellant suffered by the denial "was outweighed by the public's 'interest in the prompt and efficient administration of justice, and the trial court['s interest] in the management and control of its own docket'").

In *Morris*, this Court explained that "[t]rial judges necessarily require a great deal of latitude" because of the burden

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[2]Petition for Writ of Certiorari, at 18. As stated above, Sierra withdrew any objection to the taking itself. (R. Vol. 5, p. 927).

"of assembling the witnesses, lawyers, and jurors at the same place at the same time," and asserted that "this burden counsels against continuances except for compelling reasons." *Morris*, 461 U.S. at 11, 103 S. Ct. at 1616. Given the government's significant interest in managing its docket, and the presumption against additional process when physical liberty is not at stake, the Second District's order affirming the trial court's judgment in this case is completely consistent with *Lassiter* and *Mathews*.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED,

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